

1-1961

Rights of Indemnity as They Affect Liability Insurance

Scott Conley

George Sayre

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Scott Conley and George Sayre, *Rights of Indemnity as They Affect Liability Insurance*, 13 HASTINGS L.J. 214 (1961).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol13/iss2/6

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Rights of Indemnity

As They Affect Liability Insurance

By SCOTT CONLEY* and GEORGE SAYRE†

LIABILITY INSURANCE policies insure their holders against loss arising from injury to the property or person of another for which the holder is legally responsible. As liability is ultimately shifted between individuals by law, so is the liability shifted between their respective insurance carriers. Nowhere is this principle more evident than in the field of liability insurance pertaining to indemnity.

One indemnity situation exists when A secures a judgment against both B and C, but B is permitted to recover the entire amount for which he is held liable from C. Another indemnity situation exists where A sues only B and recovers against him, but because of the relationship between B and a third party, C, B may recover in full from C. Phrased in terms of the respective liability insurance carriers, then, and assuming the existence of an indemnity situation, B's liability insurer as subrogee of B's rights may recover the entire amount of its liability from C's carrier.

Rights of indemnity may be created by express agreement between the parties,¹ or may arise as a matter of law.² Express indemnity agreements have long been given effect in California.³ However, indemnity arising as a matter of law has only recently been generally recognized in this state.⁴ The discussion herein will pertain primarily to those rights of indemnity arising as a matter of law between two defendants or their insurers, but mention is made of several recent decisions pertaining to the interpretation of written contracts of indemnity. Rights of indemnity arising by way of warranty are outside the scope of this article.

* Yale University, Yale University Law School; Partner, Sedgwick Detert Moran & Arnold; Author, numerous articles on insurance.

† Pomona College, Stanford University Law School; Associate, Sedgwick Detert Moran & Arnold.

¹ CAL. CIV. CODE § 2772.

² PROSSER, TORTS § 46 (2d ed. 1955).

³ 26 CAL. JUR. 2d *Indemnity* §§ 1-40 (1956).

⁴ See *San Francisco Unified School Dist. v. California Bldg. Maintenance Co.*, 162 Cal. App. 2d 434, 328 P.2d 785 (1958).

Indemnity Arising as a Matter of Law

Indemnity arising as a matter of law developed as an exception to the rule of noncontribution between joint tortfeasors.⁵ That rule was deemed especially harsh in the case of certain joint tortfeasor defendants who were held liable almost without fault, while their co-tortfeasors, who were actually the responsible parties, escaped liability through the operation of the rule. To alleviate this injustice, some jurisdictions now allow the technical joint tortfeasor to recover his entire loss from the responsible party on the theory that a right of indemnity exists as a matter of law in favor of the technical tortfeasor as against the other.⁶

Situations exemplifying the allowing of indemnity actions include that in which an initial carrier has been held liable to the shipper for loss of the goods shipped but is permitted indemnity against the connecting carrier whose negligence actually caused the loss,⁷ or in which a carrier thus held liable can recover from one whose negligence produced the defective condition in the carrier's equipment which caused the injury to the goods.⁸ Another instance is that in which an employer held for an injury to an employee on the theory of violation of the non-delegable common law duty to furnish a safe place to work can have indemnity from one whose negligence rendered the working conditions unsafe.⁹

Perhaps the most common cases of all those coming under this head are the ones in which a municipal corporation is held liable to a person injured by defects in the highway, sidewalk or other product of municipal activity for public use, and is then allowed to secure reimbursement from the parties who created the defect.¹⁰ Almost identical with the municipal corporation cases are those in which an occupier of a premises is held liable for injuries arising from dangerous conditions thereon, but can recover from the one who unknown to him created the dangerous condition,¹¹ and those in which the owner of the leased premises

⁵ See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 147 (1933).

⁶ PROSSER, *supra* note 2.

⁷ Produce Trading Co. v. Norfolk So. R.R., 178 N.C. 175, 100 S.E. 316 (1919); Texas & Pac. Ry. v. Eastin & Knox, 100 Tex. 556, 102 S.W. 105 (1907).

⁸ Bethlehem Shipbuilding Co. v. J. Gutrad Co., 10 F.2d 769 (9th Cir. 1926).

⁹ Busch & Latta Painting Co. v. Woermann Constr. Co., 310 Mo. 419, 276 S.W. 614 (1925).

¹⁰ Fort Scott v. Pennsylvania Lubric Oil Co., 122 Kan. 369, 252 Pac. 268 (1927); Chesapeake & Ohio Canal Co. v. Allegheny County, 57 Md. 201 (1881). See also 4 DILLON, MUNICIPAL CORP. 3032 (5th ed. 1911).

¹¹ Westfield Gas & Mill. Co. v. Noblesville & E. Gravel Rd. Co., 13 Ind. App. 481, 41 N.E. 955 (1895); Ga. Power Co. v. Banning Cotton Mills, 42 Ga. App. 671, 157 S.E. 525 (1931).

is held to the same liability, but can recover over from the lessee in possession.¹² Again, an employer held liable under the theory of *respondere superior* for the torts of his agent or servant can get indemnity from the latter.¹³

Various Theories of Indemnity

Unfortunately, no general rules have evolved which adequately govern the general application of the indemnity principle.¹⁴ It has been stated that indemnity is permitted only where the indemnitor has breached a duty of his own to the indemnitee;¹⁵ that it is permitted only where there is a great difference in the gravity of the fault of the two tortfeasors;¹⁶ or that it is permitted only where the right to indemnity rests upon a disproportionate difference in the character of the duties owed by the two co-tortfeasors to the injured plaintiff.¹⁷ In other terms indemnity has been characterized as arising in favor of one tortfeasor against another when the former's liability is merely "secondary," or imposed by law, rather than "primary";¹⁸ it has been characterized as arising where one joint tortfeasor's negligence is merely "passive" while the co-tortfeasor's negligence is "active";¹⁹ and it has been characterized as arising in some situations where there is an "implied contractual relationship" between the two co-tortfeasors.²⁰

The most widely used of the above analyses employed by the courts in indemnity situations seem to be those based on "active v. passive" and "primary v. secondary" negligence. These analyses do not seem to be satisfactory, however, as under them the courts have been faced with the difficult task of drawing a line between that negligence which is "passive" or "secondary" enough to support indemnity against the "active" or "primary" tortfeasor, and that negligence which is not. The more recent implied contractual analysis of indemnity appears to be somewhat more satisfactory.

¹² *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 31 N.E. 987 (1892); *Miller v. New York Oil Co.*, 34 Wyo. 272, 243 Pac. 118 (1926).

¹³ *Smith v. Foran*, 43 Conn. 244 (1875); *Georgia, So. & Fla. Ry. v. Jossey*, 105 Ga. 271, 31 S.E. 179 (1898).

¹⁴ PROSSER, *supra* note 2, at 251.

¹⁵ *Humble Oil Refining Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949).

¹⁶ *Slattery v. Marra Bros.*, 186 F.2d 134 (2d Cir. 1951).

¹⁷ *Davis, Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Iowa L. Rev. 517 (1952).

¹⁸ *Busch & Latta Painting Co. v. Woermann Constr. Co.*, 310 Mo. 419, 276 S.W. 614 (1925).

¹⁹ *Underwriters at Lloyds of Minneapolis v. Smith*, 166 Minn. 388, 208 N.W. 13 (1926).

²⁰ *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956).

The Ryan Case

In 1956, the United States Supreme Court considered the problem of indemnity in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,²¹ and concluded that indemnity may arise from an implied contract between the co-tortfeasors. In that case, a longshoreman employed by the Ryan Stevedoring Company, was severely injured when a large roll of pulpboard became dislodged and struck him violently while on board ship. The rolls, stowed by the Ryan Stevedoring Company, had been improperly secured. The shipowner's officers supervised the loading of the entire ship and had the authority to reject unsafe stowage.

The injured longshoreman received compensation and medical payments from the stevedoring company's compensation carrier. Later he elected to bring suit against the steamship corporation, which he claimed was liable under the law of negligence for the injury which he had received. The shipowner then filed a third party complaint against the stevedoring company in indemnity.

The injured longshoreman's case against the shipowner resulted in a verdict in the longshoreman's favor in the amount of 75,000 dollars. By stipulation the shipowner's third party complaint was submitted to the judge who had presided over the longshoreman's case. The district judge dismissed the third party complaint. The court of appeals for the Second Circuit affirmed the verdict in favor of the longshoreman but reversed the dismissal of the third party complaint and directed that judgment be entered for the shipowner.

In this posture the case came to the Supreme Court. The question in the case pertaining to indemnity was whether in the absence of an express agreement of indemnity the stevedoring company was obligated to reimburse the shipowner for damages caused by the stevedoring company's improper performance of the service of loading the ship. The Supreme Court held that the stevedoring company was so obligated on the basis of *implied contract*; the stevedoring contractor in holding himself out as an expert in loading ships and in accepting a job in that capacity had impliedly contracted to the shipowners that the loading would be done in a safe and proper manner. The stevedoring company had breached this implied agreement, and the shipowner's action was for damages for breach of the implied contract measured by the foreseeable damages occasioned by the breach, namely the damages incurred by the injury to the longshoreman.

The *Ryan* case, and later *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*,²² both expressly indicated that "In the area of con-

²¹ *Id.*

²² *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

tractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."²³

California Decisions

With few exceptions, California did not seem to recognize rights of indemnity arising by operation of law under any theory until 1957 or 1958.²⁴ In 1957 the California legislature modified the common law to provide for contribution between joint tortfeasors, effective as of January 1, 1958.²⁵ This statute, though creating a statutory right of contribution, purported not to impair existing rights of indemnity. The existence of a right of indemnity was expressly recognized in subdivision (f) of that section which provides: "This title shall not impair any right of indemnity under existing law and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them."

The first case to expressly recognize the existence of rights of indemnity in causes of action accruing prior to or under the statute was *San Francisco Unified School Dist. v. California Bldg. Maintenance Co.*²⁶ This case grew out of an injury to an employee of the California Building Maintenance Company sustained while he was engaged in washing the windows of a school building pursuant to a contract between the school district and the Building Maintenance Company. The maintenance company through its workman's compensation insurer paid compensation. The injured employee brought a "third party action" against the school district for having failed to supply a safe place within which to work. The employee obtained judgment against the school district and collected in full. Next, the school district brought an action against the maintenance company to recover the amount paid by the school district to the employee pursuant to the judgment rendered, alleging breach of contract on the part of the maintenance company in failing to furnish the worker certain safety equipment which it had expressly agreed to supply, the absence of which allegedly caused the injury. The Building Maintenance Com-

²³ *Id.* at 569.

²⁴ See *Alisal Sanitary Dist. v. Kennedy*, 180 Cal. App. 2d 69, 4 Cal. Rptr. 379 (1960). However, prior to 1957 California did recognize indemnity rights as existing between parties in the following situations: (1) Between a principal and a negligent servant, *Johnson v. City of San Fernando*, 35 Cal. App. 2d 244, 95 P.2d 147 (1939); (2) between an automobile owner and a negligent bailee-driver, *Baugh v. Rogers*, 24 Cal. 2d 200, 148 P.2d 633 (1944); and (3) between a freight forwarder and a negligent consignee, *Merchant Shipper's Ass'n v. Kellogg Express & Draying Co.*, 28 Cal. 2d 594, 170 P.2d 923 (1946).

²⁵ CAL. CODE CIV. PROC. § 875.

²⁶ 162 Cal. App. 2d 434, 328 P.2d 785 (1958).

pany answered that the suit was an attempt to impose liability on the maintenance company for injury sustained by its own employee on which the maintenance company's insurer had already paid compensation. Further, it was argued that such indirect liability would be in conflict with provisions of the California Workman's Compensation Act which grants an exclusive remedy to an employee against his employer for injuries in the course of and arising out of employment. At the trial level motion for nonsuit was granted. The school district appealed. The court held it was improper to grant a nonsuit and reversed the judgment, stating that "whether the school district should be precluded from recovery by reason of its conduct [that is, whether the conduct of the district helped bring on the damage] is at least a question of fact and should have been left to the jury."²⁷

In the opinion there is language which would suggest that the decision might have been the same even in the absence of an express contract to supply the unfurnished safety equipment. "Even if this did not amount to an express agreement to indemnify the school district for damages caused to it by a breach of the contract by the maintenance company, such a warranty or agreement to indemnify would necessarily be implied."²⁸ Thus, though the opinion refers in many places to the "active-passive, primary-secondary" character of the negligence in indemnity, the holding in the case seems to be based primarily upon the implied contract indemnity theory developed in the *Ryan* case.²⁹

²⁷ *Id.* at 449, 328 P.2d at 794.

²⁸ *Ibid.*

²⁹ It is here appropriate to mention the legislative change which has taken place with respect to "third party" actions since the San Francisco School District case. This case and the *Ryan* case both involved injury to a contractor's employee who, notwithstanding the fact that he was covered by his employer's workmen's compensation insurance, nevertheless successfully brought suit against the property owner or "third party" for common law damages. In both cases the third party then secured indemnity against the injured employee's employer. The effect of this rather circular legal procedure was to make the employee's own employer liable not only for the injured employee's workmen's compensation but for additional damages awarded to him in common law as well. The California legislature felt that this double burden placed upon the employer was in contravention of the exclusive remedy theory of the workmen's compensation statutes. Thus in 1959 the legislature passed section 3864 of the Labor Code which reads as follows:

Liability to Reimburse or Hold Third Person Harmless on Judgment or Settlement. If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against a third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

This statute abolished the right of indemnity by the third person against the injured em-

Soon after the *School District* case, the California Supreme Court permitted a plaintiff city to maintain an indemnity action against an abutting landowner who had altered a portion of the public sidewalk for his own benefit.³⁰ Here a pedestrian walking upon the altered sidewalk was injured and collected damages from the city by way of judgment. The court held that while both the city and the owner were joint tortfeasors, and each was directly liable to the pedestrian, the city was entitled to be indemnified because of the special relationship existing between the two co-defendants with respect to the use of the sidewalk. The court stated that the rule against noncontribution between co-tortfeasors "admits of some exceptions and the right of indemnity may arise as a result of contract or equitable consideration."³¹ [Emphasis added.] The court stressed the "primary" responsibility of the owner who created or permitted the condition and the "secondary" duty of the city to correct the condition of which it had notice. Thus it would seem that this case is not based upon the implied contract rule as is the *Ryan* case, but is rather based upon the "primary-secondary" analysis employed previously in other jurisdictions.

The *Ryan* case theory was again the basis of indemnity, however, in *DeLaForest v. Yandle*.³² This was an action in indemnity arising out of the repair of a truck axle by Temple, a welder, and Yandle, a machinist. One Mast owned a truck which required axle repairs. Mast engaged DeLaForest, the operator of a repair shop, to make the repairs. DeLaForest sublet the work to Temple and Yandle, who held themselves out as qualified in their professions. The work was negligently done, and as a result the truck driven by Mast collided with an automobile driven by one Urban causing the latter's death. Both DeLaForest and Mast had put the axle in the truck without inspecting it. The Urban heirs sued Mast and DeLaForest, who were held liable. DeLaForest and Mast then demanded indemnity from Temple and Yandle on the theory that the latter had breached an implied contractual obligation to properly repair the axle. The court permitted Mast and DeLaForest to recover.

In 1960 the California indemnity decisions were summarized in *Alisal Sanitary Dist. v. Kennedy*.³³ The case arose on the following facts: the Alisal Sanitary District had contracted with Kennedy to the effect

ployee's employer on the theory of implied contract. In order to recover in indemnity the third party must now rely on an *express* contract of indemnity between himself and the injured employee's employer.

³⁰ City & County of San Francisco v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958).

³¹ *Id.* at 130, 330 P.2d at 803.

³² 171 Cal. App. 2d 59, 340 P.2d 52 (1959).

³³ 180 Cal. App. 2d 69, 4 Cal. Rptr. 379 (1960).

that the latter would install manholes in an outfall line which ran from Alisal's sewage processing plant into the Salinas River. Kennedy constructed the manholes but failed to place lock covers on them or to construct them so that the top of each manhole was substantially above the outfall line. In December, 1955, the river, swollen by rains, backed up the outfall line and forced sewage out of the manholes. The sewage ruined a crop of celery in an adjoining field owned by one Ambrosini. Ambrosini brought an action against the sanitary district and recovered judgment against the sanitary district. The district then brought suit in indemnity against Kennedy to recover the amount of the Ambrosini judgment plus attorney's fees incurred in the defense of that action.

Kennedy's counsel demurred to the complaint as failing to state a cause of action. The trial court sustained the demurrer without leave to amend. On appeal the trial court's decision was reversed, and the demurrer to the complaint overruled. The court based its decision upon the *Ryan* doctrine which gives rise to indemnity where there is a breach of an implied contract to perform a job in a safe and non-negligent manner:³⁴

The gist of the complaint is the defendant's breach of its obligation to perform the engineering work in a skillful, expert and careful manner they had represented they were capable of doing and the plaintiff's reliance on the defendant's judgment and knowledge in matters in which the latter were experts. Such an obligation carries with it an implied agreement to indemnify and to discharge foreseeable damages resulting to the plaintiff from the defendant's negligent performance.

The court noted that, in the final analysis, the determination of whether or not a given factual situation would give rise to indemnity is for the jury to decide.³⁵

The nature and scope of the relationships between the plaintiff and the defendants; the obligations owing by one to the other; the extent of the participation of the plaintiff in the affirmative acts of negligence; the physical connection of the plaintiff, if any, with the defendant's acts of negligence by knowledge or acquiescence; or the failure of the plaintiff to perform some duty it may have undertaken by virtue of its agreement—all are questions of fact that should be left to the jury.

Effect of the California Decisions

From the aforementioned cases three generalizations may be drawn:

1. California courts are tending more and more to imply a contractual duty running from one co-defendant to another in the employer-

³⁴ *Id.* at 79, 4 Cal. Rptr. at 386.

³⁵ *Ibid.*

independent contractor situation in which the potential indemnitor has promised to perform a given service or act for the potential indemnitee and has in the process injured another party. The basis for this trend is undoubtedly *Ryan*, which has been quoted and approved in some of the California decisions. Further, under the language of *Alisal*, it may be that a right of indemnity under the implied contract theory exists as a matter of law in *all* cases where there is an employer-independent contractor relationship, but that the employer's right of indemnity may be defeated if it can be shown that the employer is too closely associated with the circumstances causing the injury to be permitted recovery.

2. There may be a few other special situations which will support the right of indemnity as a matter of law, where, because of purely equitable considerations, the court feels indemnity is proper. The only California case in this area to date seems to be the *Ho Sing* case.

3. In the employer-independent contractor cases the courts emphasize several criteria which are important in measuring the employer's conduct for the purpose of determining whether or not his right of indemnity should be given effect. The cases suggest at least four criteria.

a. The degree of control exercised by the employer over the actions of the independent contractor.

b. The relative expertise of the employer as opposed to that of the independent contractor in performing the particular job at hand.

c. The relative reliance by the employer on the skill of the independent contractor in the performance of the job.

d. The relative expense which the employer would have to incur in closely supervising an activity of the independent contractor so as to prevent injury.

Indemnity Contracts in California

The recent developments in indemnity have not been confined only to indemnity as it arises by operation of law. Three important cases have come down during the past two years delineating the effect to be given to written contracts of indemnity. In *County of Alameda v. Southern Pac. R.R.*,³⁶ it was held that no action could be maintained on the theory of implied contract where a written indemnification agreement between the parties was executed providing for indemnification in some circumstances but failing to provide for indemnity under the circumstances of the case. The other two cases, *Vinnell Co. v. Pacific Elec. Ry.*³⁷ and *Harvey Mach. Co. v. Hatzel & Buehler*,³⁸ dealt with the

³⁶ 55 Cal. 2d —, 360 P.2d 327, 11 Cal. Rptr. 751 (1961).

³⁷ 52 Cal. 2d 411, 340 P.2d 604 (1959).

³⁸ 54 Cal. 2d 445, 353 P.2d 924, 6 Cal. Rptr. 284 (1960).

issue of whether or not certain contracts of indemnity covered the would-be indemnitee for injury resulting from his own negligence.

In the *County of Alameda* case, *supra*, a truck belonging to one Cali was damaged when it went out of control while crossing an improperly maintained railroad grade crossing. Cali brought an action for damages to the truck against the County of Alameda, the Southern Pacific Railroad, and the Rock Company which used the tracks under agreement with Southern Pacific. Cali recovered judgment against the County and the railroad, but the Rock Company was awarded a nonsuit. The county paid one-half the judgment, and the railroad paid the other half. The county then sued Southern Pacific and Rock in indemnity for the one-half the county paid to Cali. Southern Pacific sued Rock in indemnity for the one-half that Southern Pacific paid. The county was awarded recovery in indemnity against both Southern Pacific and Rock on the basis of *City & County of San Francisco v. Ho Sing*, but the court denied Southern Pacific recovery.

Southern Pacific's action against Rock was based upon contract. The Southern Pacific had a sidetrack agreement with Rock which provided that Rock would hold Southern Pacific harmless and would indemnify Southern Pacific for all liability resulting directly or indirectly from the operation by Rock of any of its equipment or locomotives over the track. Southern Pacific argued:

1. That this provision would provide indemnity under the circumstances of the case; and
2. That even if this provision was not adequate to support indemnity, indemnity should be implied under the implied promise theory of indemnity as in *DeLaForest v. Yandle*, *supra*, and *San Francisco Unified School Dist. v. California Bldg. Maintenance Co.*, *supra*. Rock argued that the contract provision was insufficient to support indemnity in this particular case, and secondly, that no implied promise of indemnity could be inferred in this instance as the construction of the SP-Rock contract as a whole would negative such a promise. The court accepted Rock's arguments and refused to allow Southern Pacific indemnity.

In *Vinnell Co. v. Pacific Elec. Ry.*, *supra*, the court held that an indemnitee cannot recover against a non-negligent indemnitor for injury to the indemnitee's property or employee unless the contract of indemnity specifically provides that the indemnitee will be indemnified for his own negligence. In that case a flood control district had contracted with the Vinnell Company to build a storm drain under Pacific Electric's tracks. Pacific Electric took up some tracks to facilitate construction, and the Vinnell Company proceeded to excavate the area. An

employee of the Pacific Electric Company negligently switched a train onto a track which ran into the excavated area injuring a Pacific Electric employee and damaging the train.

Before construction began Pacific Electric had granted an easement to the flood control district and the Vinnell Company, which included the following indemnity agreement:³⁹

Contractor hereby releases and agrees to indemnify and save Railroad harmless from and against any and all injuries to and deaths of persons, claims, demands, costs, loss, damage, and liability howsoever same may be caused resulting directly or indirectly from the performance of any or all work to be done upon the property and beneath the tracks of railroad and upon the premises adjacent thereto under said agreement between District and Contractor, also from all injuries to and deaths of persons . . . howsoever same may be caused either directly or indirectly, made or suffered by said contractor, contractor's agents . . . while engaged in the performances of said work.

The Vinnell Company sued Pacific Electric for damage to the excavation and their material therein. Pacific Electric cross-complained for property damage and the bodily injury to their employee. The trial court held for Vinnell Company. On appeal the decision was affirmed, the appellate court stating "In the overwhelming majority of cases the result reached by the court's interpretational efforts can be condensed into the simple rule that where the parties failed to refer expressly to negligence in their contracts, such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts."⁴⁰

The opposite result was reached in *Harvey Mach. Co. v. Hatzel & Buehler*, *supra*, in which the court held that a general hold harmless agreement between the third party and the injured employee's contractor was sufficient to support indemnity, even though the third party had breached a duty to the employee. In that case an employee of the defendant Hatzel fell down an elevator shaft while engaged in constructing a building belonging to Harvey. The injured employee sued the Harvey Machine Company, whereupon the Harvey Machine Company brought the declaratory relief action against Hatzel & Buehler to determine the parties' respective rights on the indemnification agreement executed between the two companies. The indemnification agreement read as follows:⁴¹

[Defendants agree] . . . to indemnify and hold harmless Harvey Machine Company and its officers and employees against liability including all costs and expenses for bodily or personal injuries including

³⁹ 52 Cal. 2d at 414, 340 P.2d at 606.

⁴⁰ *Id.* at 415, 340 P.2d at 607.

⁴¹ 54 Cal. 2d at 447, 353 P.2d at 926, 6 Cal. Rptr. at 287.

death at any time resulting therefrom sustained by any person or persons including employees of . . . [defendants] and arising from the use of the premises, facilities or services of Harvey Machine Co., Inc., its officers or employees.

The trial court allowed indemnity in favor of Harvey, and the appellate court affirmed, holding that the accident was in the scope of the indemnity agreement. The court differentiated the *Harvey* situation from the *Vinnell* situation in the following particulars:

1. The owner was not conducting any independent operations on his premises during contractor's work in the *Harvey* case as he was in the *Vinnell* case.

2. In *Harvey* the injury did not result from some conduct or omission unrelated to the contractor's performance over which the indemnitee exercised exclusive control.

3. In *Harvey* the breach of duty on the owner's part was merely passive negligence, while in the *Vinnell* case the Pacific Electric employee was actively negligent.

The court concluded, "The accident, in these circumstances, was one of the risks, if not the most obvious risk, against which Harvey sought to be covered."⁴² Thus under the court's analysis it seems that a party may recover in indemnity for his own negligence under written contract if the contract is interpreted as providing for indemnification for the negligence of the indemnitee. However, the language of the case does indicate that such recovery may be allowed only when the negligence of the indemnitee is merely "passive" rather than "active." In using the "active-passive" approach to the situation in the *Harvey* case the court may well be opening up the area of contract interpretation to many of the same problems which faced courts which had considered the indemnity problem prior to the *Ryan* decision.

Problems Arising Under California Decisions

The development of the law of indemnity in California over the last few years has raised several problems with respect to insurance cases. The first major problem is a practical one concerning joinder of causes of action. Other problems concern the interpretation of various provisions in liability policies in connection with claims for indemnity. Lastly, there is a problem as to the effect of the doctrine of *res judicata* in indemnity action.

Joinder of Causes of Action

As previously stated, a right to indemnity may exist between two joint tortfeasors who are both before the court in the main action, or may arise in the situation where only one tortfeasor is being sued by

⁴² *Id.* at 448, 353 P.2d at 927, 6 Cal. Rptr. at 287.

the plaintiff, but where that tortfeasor has a right over against another party. In either situation it would seem that an indemnity cross-complaint should be permitted in the main plaintiff's action. Yet as a practical matter there are many instances in which the lower courts, treating the indemnity cross-complaints under the discretionary joinder statutes, have refused to permit the joinder of indemnity cross-complaints in the main action in either circumstance. This refusal, based on the thought that a dispute between defendants has no place in a plaintiff's action and merely confuses a jury, often makes it more difficult for the potential indemnitee successfully to pursue his claim of indemnity, as in practice it seems to be more difficult to shift a liability that has already been affixed by a jury through a separate indemnity action than to place the burden on the responsible party in the main action.

Interpretation

The problems of interpretation of insurance policy provisions relative to the indemnity field are centered about two provisions commonly found in liability insurance policies. These are:

1. The "liability assumed by contract" exclusion, and
2. The exclusion as to any liability for which an employer has a workman's compensation policy.

In that the field of indemnity implied as a matter of law is so new in California, it is not surprising that there has been no interpretation in this state of any of the aforementioned provisions relating to causes of action in indemnity. However, several other jurisdictions have considered the effect to be given to these provisions in indemnity matters.

1. *The liability assumed by contract exclusion.* A typical provision of this type provides that the policy does not cover liability incurred by reason of any contract executed by the insured under which he undertakes to be liable for the acts of another. A typical liability assumed by contract exclusion may read: "This policy does not apply to liability assumed by the insured under any contract or agreement not defined herein."

It can be argued that this exclusion should exclude coverage both in a situation where the insured is held liable under an express indemnity agreement or under an implied agreement of indemnity. However, the general rule in most states is that a provision of this nature is operative to relieve the insurer of liability only in situations where the insured would not be liable to the third party except for the fact that he assumed liability under express agreement with such party.⁴³ The ex-

⁴³ *United States Fid. & Guar. Co. v. Virginia Eng'r Co.*, 213 F.2d 109 (4th Cir. 1954); *O'Dowd v. American Sur. Co.*, 3 N.Y.2d 347, 144 N.E.2d 359, 157 N.Y.S.2d 182 (1957).

clusion clause does not relieve the insurer from liability under the policy where the liability of the insured either under an express or implied contract with the third party is co-extensive with the insured's liability imposed upon him by law regardless of the theory of indemnity used in fastening liability as an indemnitor upon the insured. Thus the only instance in which such an exclusion clause would in all probability be effective is the instance in which one party for consideration has agreed to assume the potential liability of another person though the person assuming liability would not as a matter of law be charged with that liability.⁴⁴

2. *The exclusion as to any liability for which an employer has a workman's compensation policy.* New York seems to be the only state which has considered this particular exclusion in relation to the indemnity field. In *Cardinal v. United States Cas. Co.*,⁴⁵ the New York Court of Appeals held that there was no coverage afforded an employer as to that liability incurred when an employee of the employer sued a third party, and the third party secured a judgment against the employer in indemnity. The facts of this case were almost identical to those of the *Ryan* case. Cardinal was a contractor who had agreed to repair a United States government ship. One of Cardinal's employees was injured on the ship. The employee obtained a judgment against the United States government; the United States government cross-complained in indemnity against Cardinal on the ground that the government was only passively negligent. The government received a judgment against Cardinal for the amount of the employee's claim.

Cardinal's insurance policy contained the standard provision that "the insurer agreed to pay all sums which the insured was obligated by law to pay for damages" caused by accident. However, the policy contained an exclusion to the effect that no insurance was afforded for bodily injury to any employee which was covered by workman's compensation.

The trial court held that the policy covered the insured against liability incurred in the third party action. The appellate court reversed, holding that the employee's remedy against the employer in compensation was exclusive, and that the policy provision did not contemplate coverage for injury to any employee which occurred during the course and scope of employment. Thus, the fact that the employee was able to recover in a common law action against the third party, and that the third party was entitled to a judgment in indemnity against the employer, did not expand the construction to be given to the insurance

⁴⁴ See generally 63 A.L.R.2d 1114 (1954).

⁴⁵ 302 N.Y. 853, 100 N.E.2d 47, 101 N.Y.S.2d 421 (1951).

contract. The same result was reached in *American Stevedores v. American Policy Ins. Co.*⁴⁶ However, in the latter case the insurance policy was held to cover the employer's liability to the third party on the basis of a special additional insured provision of the policy.

Query as to whether California would follow these New York decisions.

Res Judicata: Indemnity actions between co-defendants in the plaintiff's main action or between a defendant in the main action and a third party are frequently tried after the completion of the main action. The question arises as to the extent that determinations of negligence in the main action are res judicata in the later action for indemnity.

Only two California cases have attacked this problem, the first being the *San Francisco Unified School District*⁴⁷ case, and the second being the recent case of *County of Los Angeles v. Cox Bros. Constr. Co.*⁴⁸ These cases appear to hold that the negligence of a defendant in the main action may be res judicata in the indemnity action in some instances. Nevertheless, the fact that the negligence of one party is established by res judicata is not determinative of the indemnity action, as under the *Alisal*⁴⁹ case the right to indemnity depends not upon the mere establishing of negligence on the part of one of the parties, but rather depends upon the various relationships between the parties which culminated in the creation of the hazard.

Conclusion

The recent developments in indemnity law in California have in certain instances shifted the ultimate liability from one party to another where heretofore such liability would not have been shifted. This seems to be particularly true in the area of the employer-independent contractor relationship. Further, more and more concerns seem to be employing the written indemnity agreements to insulate themselves against potential liability in the construction field. It is apparent that especially in this area, as in some others, the impact of the development of indemnity law will be felt by insurance carriers. Consequently the carriers will have to re-evaluate their risk potential and accordingly their premium ratings as respects those industries in which the incidence of shifting liability through indemnity is substantial.

⁴⁶ 138 N.Y.S.2d 513 (1955).

⁴⁷ *Supra*, note 26.

⁴⁸ 195 ACA 897 (1961).

⁴⁹ *Supra*, note 33.